Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1974

No. 74-1274

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.,

Respondent,

v.

ABBOTT LABORATORIES, et al,

Petitioners.

RESPONDENT'S OBJECTION TO AMERICAN HOSPITAL ASSOCIATION MOTION TO FILE BRIEF AND BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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"Small Business Problems in the Drug Industry," House Select Committee on Small Business, House Report No. 1983, 90th Congress, 2d Session, Dec. 31, 1968, pp. 77-83 5

change, Inc., Dkt. 74-304. (U. S. Supreme Court Bulletin, B 650-651.)

Movant has no direct interest or standing.

Movant's motion and conditionally filed brief do not aid the Court, for they:

(a) beg the question;

(b) add nothing relevant to the record or argument not already advanced by petitioners;

(c) assume "facts" not in the record;

(d) rely on self-serving documents prepared by hospital advocates that are not in the record;

(e) rely on policy questions that should be addressed to the Congress, not the courts, and

(f) assume the record was incomplete when, in fact, the record was extensive, i.e., some 50 depositions and thousands of pages of exhibits, and more than adequate for the issues decided.

Contrary to movant's unsupported claim of harm or interference, the opinion does not interfere with any hospital function; a hospital may continue to dispense drugs to staff, employees, the "walk-in" general public, physicians for resale in their private office practice, and all categories of patients:

> ". . . The question is not whether the hospitals can continue to provide this useful community service. The question is whether in providing it they may acquire the drugs for such resale at an acquisition price that discriminates against local retail druggists. We hold that they may not." (Petitioners' Appendix at A7).

Movant errs in claiming at p. 3 of its motion that ". . . it is the 'nonprofit' hospitals whose interests have not been represented in the prior proceedings in this action.":

(a) The interests of petitioners and the interests of the "nonprofit" hospitals were and are identical — both desire to continue the challenged practices;

(b) Several of the "nonprofit" hospitals were represented at depositions taken by respondent by law firms that at the same time represented various of the petitioners;

(c) During the extensive depositions the hospitals were represented by counsel, including counsel for the Oregon Association of Hospitals, an apparent affiliate of movant, American Hospital;

(d) During the depositions the hospital witnesses presented without objection, much evidence in support of the challenged drug dispensing practices;

(e) At the District Court and Court of Appeals level the respondents asserted movant's position and arguments. See, for example, Petitioners' Appendix A6-A7.

Movant errs in implying that the "nonprofit hos-

pitals pass on to their patients the lower prices they receive from petitioners and some, but not all, drug manufacturers.

(a) There is no evidence in the trial court file that a patient (as distinct from a physician or employe) paid a lower hospital drug price because the hospital purchased the drug for less than the price to the competing retail pharmacy;

(b) The evidence is to the contrary.

(c) There is substantial, uncontradicted, evidence that the hospital patient paid the average, or above, price that a retail pharmacy would have charged for the same quantity and grade of drugs;

(d) In welfare cases the admitted evidence is that at least one hospital overcharged the Welfare Division of the State of Oregon for drugs to welfare patients;

(e) It is elementary that the "nonprofit" hospital pharmacies would have operated at about the break-even point if hospitals passed on to patients their lower drug acquisition costs;

(f) The admitted record shows that after all deductions from gross drug income, i.e., losses from operation of the hospital cafeteria, the hospitals reported net profits on drug sales of as high as 60 per cent:

> ". . . It was undisputed that the hospitals derived substantial profits from the sale of drugs and from time to time enjoyed over-all operating surpluses. . . ." (Petitioners' Appendix A3).

Movant makes the unsupported assumption that the decision means higher drug prices to "nonprofit" hospitals.

The assumption is pure speculation.

Movant ignores the perhaps equal possibility that drug firms will lower retail pharmacy prices to the "nonprofit" hospital level, and thus end their price discrimination.

Movant does not advise the Court that only some drug companies sell at discriminatory prices to "nonprofit" hospitals.

A number of drug companies sell their products to "nonprofit" hospitals and retail pharmacies at the same price.

Movant and its member hospitals have been on notice since 1968 that the House Small Business Committee concluded that certain hospital drug sales were outside the 15 U.S.C. § 13c exemption to the Robinson-Patman Act:

> "Small Business Problems in the Drug Industry," House Select Committee on Small Business, House Report No. 1983, 90th Congress, 2d Session. Dec. 31, 1968, pp. 77-83.

Movant and its member hospitals have been on notice since *Students Book Company* v. *Washington Law Book Company*, 232 F.2d 49 (D.C. Cir. 1955), cert. den., 350 U.S. 988, that certain sales were outside the 15 U.S.C. § 13c exemption:

> "5. . . . Although the appellee has sold books

> to all three of the universities for their own use, *i.e.*, for their libraries, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and *the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions.*" 232 F.2d at 50-51, fn. 5. (emphasis added).

Movant relies on the irrelevant ground that the Supreme Court should judicially enlarge the § 13c exemption because hospital drug dispensing practices have changed since § 13c was enacted in 1938.

Movant thus concedes that "nonprofit" hospitals engage in drug dispensing practices such hospitals did not engage in when § 13c was enacted.

Gulf Oil Corporation v. *Copp Paving Company, Inc.*, — U.S. —, 95 Sup. Ct. 392, 402 (1974) rejected judicial amendment:

> ". . . But whether it would justify radical expansion of the Clayton Act's scope beyond that which the statutory language defines—expansion, moreover, by judicial decision rather than amendatory legislation — is doubtful. . . ."

Movant's motion should be denied because it ignores the principle that a statute is construed as of the time of and with reference to the circumstances existing at the time of enactment:

> *United States* v. *Wise*, 370 U.S. 405, 411 (1962).
> *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 323 (1961).
> *United States* v. *Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951).

Movant relies on the irrelevant ground that the decision may be adverse to the economic interest of its members. Assuming *arguendo* such adverse impact, promotion of self-interest does not invoke the rule of reason to immunize otherwise illegal conduct in violation of the antitrust laws. *Otter Tail Power Company* v. *United States*, 410 U.S. 366, 380 (1973).

Assuming *arguendo* the possibility of an adverse effect, it is the legislative and not the judicial branch of the government from which relief should be sought. *Anchor Serum Company* v. *Federal Trade Commission*, 217 F.2d 867, 873 (7th Cir. 1954).

CONCLUSION

For the above reasons, the instant motion should be denied.

Respectfully submitted,

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April 18, 1975.